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No. 91-7749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSE ANTONIO ORTEGA-RODRIGUEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR PETITIONER

JAMES R. GAILEY
Federal Public Defender
Southern District of Florida

STEWART G. ABRAMS
Assistant Federal Public Defender
Counsel of Record

PAUL M. RASHKIND
Assistant Federal Public Defender
Chief of Appeals

Consolidated Bank Building
101 N.E. 3rd Avenue—Suite 202
Ft. Lauderdale, FL 33301
(305) 356-7436

QUESTION PRESENTED

Whether a former fugitive from sentencing must automatically forfeit the right to appeal his conviction.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The orders of the Eleventh Circuit Court of Appeals granting the government's motion to dismiss Mr. Ortega's appeal, J.A. 78, and denying his motion to reinstate appeal, J.A. 93, are not reported. The district court's order denying Mr. Ortega's renewed motion for judgment of acquittal, J.A. 18, is not reported. The opinion of the United States Court of Appeals for the Eleventh Circuit which reversed the convictions of co-defendant Becerra-Flores and affirmed the convictions as to co-defendant Mieres-Borges is reported as *United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 1633 (1991). J.A. 17.

JURISDICTION

The judgments of the court of appeals were rendered on July 19, 1991 and January 22, 1992. The petition for writ of certiorari was filed on March 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 28 U.S.C. § 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Title 28 U.S.C. §§ 2072(a) and (b) provide:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

STATEMENT OF THE CASE

A jury convicted Jose Antonio Ortega-Rodriguez ("Petitioner") and Osvaldo Becerra-Flores ("co-defendant") of conspiracy and possession with intent to distribute cocaine, in violation of 46 U.S.C. Appendix §§ 1903(a), (g), (j) and 18 U.S.C. § 2. R. 61, 62. The evidence against them was virtually identical, except for one

item of evidence, a boat registration, which was admitted against co-defendant Becerra-Flores only. T. 202. Petitioner fled before sentencing and was sentenced *in absentia* to imprisonment for 19 years, 7 months. R. 81. His identically-situated co-defendant did not flee; he was sentenced and appealed to the United States Court of Appeals for the Eleventh Circuit, which reversed his conviction based upon insufficiency of evidence. *United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 1633 (1991).[1] J.A. 17, 64.

Petitioner was a fugitive for 11 months, all before he filed a notice of appeal. R. 121. Upon his capture, the district court granted a motion to vacate Petitioner's sentence, J.A. 3, and entertained a renewed post-trial motion for judgment of acquittal, based upon the *Mieres-Borges* decision. J.A. 11. The motion was denied, J.A. 46, and Petitioner was sentenced to imprisonment for 15 years, 8 months. J.A. 51. Petitioner filed a timely notice of appeal from the newly entered Judgment and Commitment. R. 121.

Petitioner was indicted for, convicted of, and separately sentenced to a consecutive term of 21 months imprisonment for contempt of court and failure to appear for sentencing. J.A. 7, 58.

After Petitioner filed a brief in support of his appeal of the original drug charges, the government moved to dismiss the appeal under the "well established case law" of *United States v. Holmes*, 680 F.2d 1372 (11th Cir.

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[1] The trial also included a third defendant, Roberto Mieres-Borges, but his case is substantially different from that of Petitioner and co-defendant Becerra-Flores. Mr. Mieres-Borges made a damaging statement which the jury considered in a separate phase of a bifurcated trial. The verdicts against Petitioner and Becerra-Flores were returned by the jury before it considered Mieres-Borges' statement. Mieres-Borges was convicted at the conclusion of the bifurcated trial, and his conviction was affirmed on appeal in *United States v. Mieres-Borges*, 919 F.2d 652.

1982), *cert. denied*, 460 U.S. 1015 (1983), and *United States v. London*, 723 F.2d 1538 (11th Cir. 1984), *cert. denied*, 467 U.S. 1228 (1984), arguing that "appellant Jose Antonio Ortega-Rodriguez is precluded from appealing his conviction." J.A. 71. The government's motion did not allege any particular factors militating in favor of dismissal, arguing instead that Petitioner's pre-appeal fugitive status constituted a waiver of the right to appeal his conviction. The court of appeals granted the motion to dismiss, J.A. 78, and subsequently denied Petitioner's motion to reinstate appeal and to reconsider the order dismissing the appeal. J.A. 79-93.

The Supreme Court of the United States granted certiorari and leave for Petitioner to proceed *in forma pauperis* on June 15, 1992. J.A. 94.

SUMMARY OF ARGUMENT

This Court has declined to entertain appeals of defendants who are fugitives during the appellate process. The Court has never extended the rule to include dismissals of appeals by former fugitives who are in custody at the commencement of the appeal. This Court and nearly every court of appeals have employed a case-by-case discretionary analysis when deciding whether to dismiss or to permit an appeal by a former fugitive.

Alone in its analysis, the Eleventh Circuit requires the dismissal of the appeal of a conviction by any defendant who was at any time a fugitive from the trial or sentencing proceedings. The Eleventh Circuit's case law creates a mandatory rule of dismissal which requires that every former fugitive forfeit the appeal of his conviction regardless of the circumstances or nature of the case. The Eleventh Circuit, in violation of federal statute, rules of court, and this Court's precedent, effectively abrogates the congressionally created right to appeal.

Such blind adherence to an automatic rule of dismissal is an unauthorized intrusion into the legislative process.

In contrast, the exercise of discretion based upon the individual circumstances of each case effectuates congressional purpose, rules of court, and decisions of this Court.

The appropriate exercise of discretion should consider whether the former fugitive has obtained an unfair advantage by prejudicing either the appellate process or potential post-appellate proceedings. The court should also weigh the need to vindicate the authority of law repudiated by the fugitive's flight.

In this case, Petitioner's flight did not prejudice the appellate process. A complete record-on-appeal has been filed with the court of appeals. The Eleventh Circuit has already determined that the evidence is inadequate to sustain the conviction of Petitioner's identically-situated co-defendant. Post-appellate prejudice is nonexistent because, if the court reverses Petitioner's conviction for failure to prove essential elements of the crime charged, there will be no retrial.

Petitioner's repudiation of the district court's proceedings has been addressed and punished in a separate prosecution in which he was indicted, convicted, and sentenced to a consecutive term of imprisonment for contempt of court and failure to appear.

Petitioner has been sentenced to 17½ years imprisonment, only 21 months of which is for failure to appear and contempt of court. The balance of his sentence is for drug crimes of which he was convicted with evidence that the Eleventh Circuit has determined to be insufficient. Yet the Eleventh Circuit's precedent requires it to refuse Petitioner his congressionally mandated right to appeal the drug convictions.

When a lower court improperly limits the right of appeal in a criminal case, this Court issues a writ of certiorari to require it to consider the appeal on the merits. The Court should do so now.

ARGUMENT

Although the right to appeal a criminal conviction does not have its genesis in the Constitution, *Abney v. United* States, 431 U.S. 651, 656 (1977), it has been embodied in federal law for nearly all of this century. *Id.*; Act of Feb. 6, 1889, 25 Stat. 656; Act of Mar. 3, 1911, 36 Stat. 1133. By act of Congress, a convicted criminal defendant has a right to appeal the conviction. 28 U.S.C. § 1291; *Abney*, 431 U.S. at 656 n.3. "Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right." *Coppedge v. United States*, 369 U.S. 438, 441 (1961).

To exercise the right of appeal in criminal cases, "one must come within the terms of the applicable statute—in this case, 28 U.S.C. § 1291." *Abney*, 431 U.S. at 656. The terms of section 1291 grant jurisdiction to the court of appeals to hear appeals from all final decisions of the district courts of the United States. To effect this right, a defendant must conform to the procedural requirements of an appeal, which are set forth in the Federal Rules of Appellate Procedure, including timely filing of the notice of appeal, transcript order, record on appeal and briefs. *Coppedge*, 369 U.S. at 441-42. Neither the statute nor the rules address forfeiture of the right to appeal in cases in which the procedural formalities have been satisfied.

However, the Court has declined to entertain the appeal of a criminal defendant who escaped from custody and remained a fugitive during the pendency of the appeal. *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (and cases cited therein). Although the appeal remains an adjudicable case or controversy, the Court has reasoned that a fugitive is not entitled to call upon the Court's resources to determine the merit of his claim. *Id.* at 366. This judicially engrafted exception to the statutory right of appeal authorizes the Court to decline to adjudicate the case of a fugitive from justice, while he is a fugitive from justice.

This Court has never extended the rule to require dismissal of the appeal of a *former* fugitive, who is in custody at the time of his appeal. Nearly every court of appeals subscribes to the policy that the appeals of former fugitives should be allowed or denied on a discretionary basis, considering relevant factors case-by-case. *United States v. Matista*, 932 F.2d 1055, 1057 (2nd Cir. 1991) (dismissing appeal but noting "we remain mindful 'that we have discretion to reach the merits in an appropriate case.'"); [2] *United States v. Wright*, 902 F.2d 241, 242 (3rd Cir. 1990) ("It is without question that we have the discretion to dismiss the appeal."); *United States v. Snow*, 748 F.2d 928, 930 (4th Cir. 1984) ("[T]he court has decided to exercise its discretion in favor of permitting the appeal to proceed."); *United States v. DeValle*, 894 F.2d 133, 137 (5th Cir. 1990) ("dismissal of appeal because of prior fugitive status is discretionary with the appellate court . . ."); *United States v. Dawson*, 350 F.2d 396 (6th Cir. 1965) (exercising discretion not to dismiss appeal if present fugitive surrenders and becomes a former fugitive within 30 days of appellate court's order); *Brinlee v. United States*, 483 F.2d 925 (8th Cir. 1973) (exercising discretion not to dismiss appeal if present fugitive surrenders and becomes former fugitive within 30 days of appellate court's order); *Katz v. United States*, 920 F.2d 610, 612 (9th Cir. 1990) ("we *may* dismiss an appeal of a fugitive" but refusing to do so in the case of a former fugitive) (emphasis added); *United States v. Parrish*, 887 F.2d 1107, 1109 (D.C. Cir. 1989) ("we will not exercise our discretion to allow a belated appeal of this conviction" where the defendant was a fugitive for 14 years); *cf. Dentley v. Lane*, 720 F.2d 472 (7th Cir. 1983) (exercising discretion to reinstate appeal if present fugitive becomes a former fugitive by surrendering within 30 days of dismis-

[2] *Accord United States v. Persico*, 853 F.2d 134, 137 (2nd Cir. 1988) (exercising discretion to dismiss appeal); *United States v. Baccollo*, 725 F.2d 170, 172 (2nd Cir. 1983) (declining to exercise discretion to dismiss appeal).

sal). One circuit has held that appeals should not be dismissed unless the defendant is a fugitive during the appeal. *United States v. Anagnos*, 853 F.2d 1 (1st Cir. 1988).

The Eleventh Circuit Court of Appeals stands alone. It has extended *Molinaro* to an extreme by *requiring* the dismissal of any appeal of a conviction if the defendant was once a fugitive from sentencing, "unless he can demonstrate that his absence was due to matters completely beyond his control." *United States v. Holmes*, 680 F.2d 1372, 1373 (11th Cir. 1982). The *Holmes* court reasoned that the mere act of becoming a fugitive[3] while awaiting sentencing is a waiver of the right to appeal the conviction. Then, using the same rationale, the Eleventh Circuit stretched *Molinaro* to require the dismissal of every appeal in which a defendant had earlier been a fugitive from any stage of the trial proceedings. *United States v. London*, 723 F.2d 1538 (11th Cir. 1984). Together, *Holmes* and *London* penalize every former fugitive by requiring forfeiture of the right to appeal the conviction.[4]

The Eleventh Circuit's mandatory penalty requires that Petitioner lose the right to appeal his conviction because he was a fugitive before the appeal was initiated. Since the Eleventh Circuit will not exercise discretion in this matter, it must dismiss Petitioner's appeal, without consideration of any other fact or circumstance of the case. Thus, in the present case, the Eleventh Circuit has failed to consider the following relevant circumstances: (a) The

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[3] As used in this argument, the term fugitive connotes a voluntary act of fleeing, removing any fugitive from the Eleventh Circuit's exception for one who is absent "due to matters beyond his control."

[4] One Eleventh Circuit judge has wondered aloud if the *Holmes* and *London* rationale could lead to forfeiture of the right of appeal if the defendant becomes a fugitive "before trial." *United States v. London*, 723 F.2d at 1540 n.1 (Johnson, J., dissenting).

present appeal seeks only to address the sufficiency of evidence to support the conviction in a case in which the court of appeals has already determined that there is insufficient evidence to convict an identically-situated co-defendant. *United States v. Mieres-Borges*, 919 F.2d at 660; (b) Neither the court nor the government can be prejudiced by allowing the present appeal addressed solely to the sufficiency of evidence. The record of proceedings has been transcribed, prepared and filed with the court of appeals. If the convictions are reversed on appeal due to insufficiency of evidence, there will be no retrial, *Burks v. United States*, 437 U.S. 1, 18 (1978), so there will be no further need for witnesses whose memories may have faded, nor for evidence which may be lost; (c) The court from which Petitioner fled has already vindicated the authority of law since Petitioner has been separately punished for becoming a fugitive. He has been indicted for, convicted of, and sentenced to a consecutive term of 21 months imprisonment for contempt of court and failure to appear.

One cannot fairly dispute that some fugitives should lose the right to appeal their conviction. But the forfeiture should not be automatic. Indeed, this Court has refused to adopt an automatic dismissal rule for fugitives. In a case in which the defendant was a fugitive while his case was pending before this Court, *United States v. Sharpe*, 470 U.S. 675 (1985), the Court rejected the idea that dismissal is an automatic consequence. *Id.* at 681-82 n.2. Even those justices who called for dismissal did so based upon the Court's "discretion" first recognized in *Smith v. United States*, 94 U.S. 97 (1876), *United States v. Sharpe*, 470 U.S. at 722 (Stevens, J., dissenting), or as a matter of the Court's "choos[ing]", *id.* at 688 (Blackmun, J., concurring), not upon some automatic rule which requires dismissal.

The right to appeal a criminal conviction was created by act of Congress, now codified at 28 U.S.C. § 1291.

Congress has authorized the Supreme Court to prescribe rules of practice and procedure for such appeals, 28 U.S.C. § 2072, but these rules are not unlimited: "Such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). In accordance with this law,[5] the Court has codified detailed rules of appellate procedure. Fed. R. App. P. 1 advisory committee's note. None of the rules causes forfeiture of the right of appeal when all other procedural requirements have been met.

One of the Court's rules grants to the courts of appeals authority to adopt their own rules, but the authority is limited. Rule 47, Federal Rules of Appellate Procedure, accords the courts of appeals limited authority "to make rules consistent with rules of practice and procedure promulgated by the Supreme Court." Fed. R. App. P. 47 advisory committee's note. The *Holmes-London* precedent of the Eleventh Circuit is not a rule of court, adopted in accordance with the rule-making power authorized by law. Moreover, this Court has not permitted judicial decisions to substitute for the rule-making process. *United States v. Robinson*, 361 U.S. 220, 229 (1960).

There is no indication that Congress intended to foreclose former fugitives from the right to appeal their convictions. Congress' most recent pronouncement on the subject is found in 18 U.S.C. § 3146, which provides the penalty for one who fails to appear in court. The law authorizes penalty by fine, consecutive imprisonment, 18 U.S.C. § 3146(b), and by forfeiture of property posted as part of an appearance bond, 18 U.S.C. § 3146(d), but that is all.

The Eleventh Circuit's precedent requiring the automatic dismissal of the appeal of a former fugitive, who

[5] The authority to prescribe rules for criminal appeals was for a long time found at 18 U.S.C. § 3771, *repealed by* Pub. L. No. 100-702, Title IV, § 404(a)(1), November 19, 1988, 102 Stat. 4561, in favor of 28 U.S.C. § 2071-2077, relating to rules of court generally.

is not a fugitive during the pendency of his appeal, abridges the substantive right of appeal created by Congress. The Eleventh Circuit's refusal to evaluate each fugitive individually, to use discretion in the dismissal of such appeals, defies the right created by Congress, in violation of 28 U.S.C. § 2072(b).

If an appellate court is to deny the right of appeal for matters which did not occur before it, then the dismissal must be the product of thoughtful discretion, based upon the facts and circumstances at hand. This is the procedure employed by the Court and all but one court of appeals. The Eleventh Circuit's blind adherence to a mandatory rule of dismissal for former fugitives from sentencing is an unauthorized limitation on the congressionally mandated right of appeal.

The proper exercise of discretion should be case-specific. A review of those decisions which have exercised discretion, *see, e.g., supra* pp. 7-8 *and infra* pp. 13-16, identifies a variety of potential issues of concern, all of which coalesce into three broad categories:

1. **Prejudice in the appellate court.** This explores the impact the fugitive has had on the court's ability to entertain a meaningful appeal. Can a proper record-on-appeal be prepared? Are the transcripts of proceedings available or can the proceedings still be transcribed?

2. **Prejudice in potential post-appellate proceedings.** These issues consider the impact the fugitive has had on post-appellate proceedings. If a retrial is ordered, are witnesses available for retrial? Are their memories intact? Is physical evidence available or has it been lost? If the defendant's appeal is unsuccessful, can the court's judgment be enforced?

3. **Need to vindicate the court's authority.** Has the court before which the defendant was a fugitive vindicated the authority of law? Has he been held in contempt? Has he been prosecuted for failure to appear?

Has he received a meaningful punishment, such as a consecutive sentence?

Upon these considerations it would be an abuse of discretion to deny Petitioner the right to appeal his conviction.

1. **No prejudicial impact in appellate court.** The sole issue in Petitioner's appeal involves the sufficiency of evidence to support the convictions.[6] The record of proceedings has been transcribed, prepared and filed with the court of appeals. The court can entertain a meaningful appeal. The court of appeals has not previously undertaken to analyze the sufficiency of evidence against Petitioner, since he was a fugitive during the appeal of his co-defendants. *See United States v. Mieres-Borges*, 919 F.2d at 654 n.1. If Petitioner had appealed with his co-defendants, the court of appeals would have had to undertake a separate sufficiency-of-evidence analysis at that time. Thus, the court of appeals will undertake the same consideration for this defendant that it would have otherwise, albeit at a later time.

2. **No prejudicial impact in potential post-appellate proceedings.** If the conviction is reversed on appeal due to insufficiency of evidence, there can be no retrial. *Burks v. United States*, 437 U.S. at 18. The government cannot be prejudiced since it will have no need to call witnesses whose memories have faded, nor to produce evidence which may be lost. If the appeal is unsuccessful, Petitioner is already in custody for the court to effect its judgment and commitment.

3. **No further need to vindicate the authority of law.** The government and district court have already vindicated the authority of law. Petitioner has been separately punished for being a fugitive. He was indicted for, convicted of, and sentenced to a consecutive term of 21

[6] *See* Brief of Appellant, filed in the Eleventh Circuit Court of Appeals, April 24, 1991.

months imprisonment for contempt of court and failure to appear.

The court of appeals dismissed Petitioner's timely appeal of his conviction under an automatic rule of dismissal, because he was a fugitive before the appeal was initiated. The court of appeals refused to exercise its discretion on a case-by-case basis. In the process, the court of appeals has improperly abrogated the congressionally mandated right of appeal. If the court of appeals had exercised discretion in deciding whether to dismiss this appeal, it would have been an abuse of discretion to grant dismissal.

The government would defend the Eleventh Circuit's *Holmes-London* precedent, and the dismissal of Petitioner's appeal, by claiming reliance upon *Molinaro v. New Jersey*, 396 U.S. 365; *Eisler v. United States*, 338 U.S. 189 (1949); *Bonahan v. Nebraska*, 125 U.S. 692 (1887); *Smith v. United States*, 94 U.S. 97; *Estelle v. Dorrough*, 420 U.S. 534 (1975); and *Allen v. Georgia*, 166 U.S. 138, 142 (1897).[7] Upon close scrutiny, these decisions are not helpful to the government, but are supportive of Petitioner's contention. First, each of the decisions involved a defendant whose appeal was dismissed because he was a fugitive *during* a pending appeal. Second, none of the decisions require automatic dismissal of the appeal of a former fugitive; instead they *allow* dismissal in appropriate cases, based upon the facts of the case and the statutory scheme of the jurisdiction. Third, to the extent a fugitive defendant is returned to custody, each of the decisions acknowledges the discretion of the respective courts and legislative schemes to allow an appeal by a former fugitive.

Unlike the present Petitioner, Molinaro was a fugitive at the time of his appeal in this Court. It follows that the Court would find him "disentitle[d]" to call upon the

[7] Brief of the United States, filed herein May 1992.

Court's resources to determine his claim. *Molinaro v. New Jersey*, 396 U.S. at 366. The Court's holding includes a significant choice of words: "Under these *circumstances* we *decline* to adjudicate his case." *Id.* at 365 (emphasis added). The Court's words express a case-specific discretionary decision, not an automatic or mandatory rule of dismissal.

In *Eisler v. United States*, 338 U.S. at 190, a majority of the Court removed the petitioner's case from the docket until further order because he was then a fugitive. However, the Court refused to hold that the fugitive status automatically deprived the Court of jurisdiction. *Id.* (Vinson, C.J. and Frankfurter, J., dissenting). Instead the Court exercised its discretion based upon the circumstances of the case. *See id.* at 194 (Murphy, J., dissenting).

Similarly, in *Bonahan v. Nebraska*, 125 U.S. 692, the Court removed from the docket the case of a present fugitive, "unless the plaintiff in error is brought or comes before the court below on or before the last day of this term . . ." The Court exercised its discretion not to dismiss automatically, offering an option for the fugitive to return before the term of court expired.

In *Smith v. United States*, 94 U.S. at 97, the Court stated, "It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render."

Molinaro, *Eisler*, *Bonahan* and *Smith* each involve a discretionary decision to withhold further consideration of the appeals of present fugitives. In none of these cases did the Court hold that dismissal is automatic or that dismissal is appropriate for former fugitives who were not at large during the pending appeal.

In *Allen v. Georgia*, 166 U.S. 138, the defendant had escaped after his conviction and sentence and remained

a fugitive during his writ of error to the Georgia Supreme Court. The Georgia court ordered that it would dismiss the proceeding unless the defendant surrendered or was recaptured within 60 days. Since the defendant remained a fugitive after the expiration of 60 days, his writ of error was dismissed. *Id.* at 139. When Allen was eventually recaptured the next year, after the expiration of the term of court, he was resentenced and sought a writ of error from the United States Supreme Court, this time challenging the Georgia Supreme Court's dismissal of his original writ of error. This Court found no denial of due process under the Federal Constitution and determined that the dismissal was consonant with the state law of Georgia.

The result in *Allen* is entirely consistent with the present Petitioner's argument before this Court. First, unlike Petitioner, Allen was a fugitive during the appeal and at the time his appeal was dismissed. It is reasonable for a court to dismiss the appeal of a party who will not submit to the court's jurisdiction at the time the claim is being made. Second, unlike Petitioner, Allen could not file a timely appeal since the law of Georgia would not permit an appeal after the term of court expired. *Id.* at 142. Third, this Court acknowledged that dismissal was not an automatic consequence, even though Allen had been a fugitive during his appeal: "Whether the court should give the plaintiff sixty days, or until the last day of the term, to appear and surrender himself to custody, was a matter for the court to determine . . ." *Id.* By this observation, the Court recognized that even a defendant who was a fugitive during his appeal does not automatically forfeit his appeal if he surrenders before the appeal is dismissed.

Finally, the government relies upon *Estelle v. Dorrough*, 420 U.S. 534, in which the Court explored the statutory scheme of appeals in Texas. By statute, the Texas Court of Criminal Appeals is deprived of juris-

diction "[i]f the defendant pending an appeal in a felony case[] makes his escape from custody." *Id.* at 535 n.1. "[T]he escape divests the court of jurisdiction with later dismissal being a mere formality." *Id.* However, the statute allows the court in its discretion to reinstate the appeals of former fugitives who are returned to custody within a set time limit. This discretion had been exercised to both grant and deny reinstatement of appeals in Texas. *Id.* at 539 n.8. The statute does not apply to defendants who flee pre-appeal but are recaptured in time to file a timely appeal. *Id.* at 539. This Court upheld the Texas statute against an equal protection challenge, as a rational exercise of state legislative judgment. *Id.* at 538 n.7.

Dorrough differs from the present case in three ways. First the *Dorrough* Court was considering a different statutory scheme. A Texas statute grants the right of appeal, but extinguishes jurisdiction if the defendant becomes a fugitive during a "pending appeal." Under federal law, Congress has created a right of appeal, but has not limited the right in the case of a fugitive. *See supra* pp. 6-12. Second, Dorrough was a fugitive *during* his appeal; Petitioner was not. Third, the *Dorrough* decision acknowledges the court's discretion to allow the appeal of a former fugitive; the *Holmes-London* precedent of the Eleventh Circuit causes automatic waiver of the right to appeal a conviction.

In short, the government defends the Eleventh Circuit's rule of automatic, mandatory dismissal with six decisions, all of which are inconsistent with that rule.

It is ironic. The question of whether Petitioner should be denied the right to appeal his conviction is based entirely upon legitimate concerns for the proper administration of justice. Yet, if Petitioner's appeal is correct, his conviction on legally insufficient evidence is a result of a breakdown in the administration of justice. His insufficiency-of-evidence contention is not merely an argument in the abstract; the court of appeals has already released his identically-situated co-defendant for this very reason. *See United States v. Mieres-Borges*, 919 F.2d at 660. If Petitioner is legally not guilty of the drug crimes, his only crime—being a fugitive—will be punished by imprisonment for 17-1/2 years, well in excess of the maximum authorized by Congress, 18 U.S.C. § 3146, and over seven-fold longer than the applicable guideline sentence for failure to appear. United States Sentencing Commission, *Guidelines Manual*, § 2J1.6.

When lower courts improperly limit the right of appeal in a criminal case, this Court issues a writ of certiorari to the court of appeals to require it to consider the appeal on its merits. *Coppedge*, 369 U.S. at 437; *cf. Lozada v. Deeds*, 111 S.Ct. 860, 862 (1991). The Court should do so now.

CONCLUSION

A writ of certiorari should issue to the court of appeals, directing it to consider the merits of Petitioner's appeal of his conviction.

Respectfully submitted.

JAMES R. GAILEY
Federal Public Defender
Southern District of Florida

STEWART G. ABRAMS
Assistant Federal Public Defender
Counsel of Record

PAUL M. RASHKIND
Assistant Federal Public Defender
Chief of Appeals
Consolidated Bank Building
101 N.E. 3rd Avenue—Suite 202
Ft. Lauderdale, FL 33301
(305) 356-7436